## IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS AUSTIN DIVISION

THE LUTHERAN CHURCH – MISSOURI	<b>§</b>
SYNOD, a Missouri nonprofit corporation	§
Plaintiff,	§
	§ Case No. 1:23-cv-1042-DE
<b>v.</b>	§ [Consolidated with 1:24-cv-00176-DE]
	§
DONALD CHRISTIAN, CHRISTOPHER	§
BANNWOLF, CONCORDIA	§
UNIVERSITY TEXAS, INC., & JOHN	§
DOES 1-12	§
Defendants	§

## JOINT ADVISORY ON PENDING DISCOVERY DISPUTES

NOW COME, through undersigned counsel, Plaintiff, The Lutheran Church – Missouri Synod, a Missouri nonprofit corporation (LCMS) and Defendant Concordia University Texas, Inc. ("CTX") (collectively "Parties") and file this Joint Advisory on pending discovery disputes as ordered by the Court.

- 1. Counsel for the Parties conferred at 2:00 p.m. on Monday, November 11th regarding CTX's pending Motion for Protective Order and LCMS's pending Motion to Compel, which are both set for hearing on Thursday, November 14th at 2:00 p.m. After conference, the Parties agree that they need assistance from the Court as follows:
- 2. <u>How Regents voted</u>. LCMS's Interrogatories 1-7 and 12-14, Request for Production number 40 to CTX, and request numbers 43-44 in its subpoenas to former Regents seek information and documents as to how specific Board of Regents members voted on a number of resolutions, as well as their internal discussions and opinions regarding the topics of those resolutions.

- 3. It is CTX's position that this information is protected by CTX's and its Board members' First Amendment rights of Freedom of Religion and Freedom of Association, as well as the Religious Freedom Restoration Act. CTX contends that LCMS's request for this information cannot satisfy the exacting scrutiny required to override these privileges particularly because it does not have a right to pursue a cause of action against the Regents.
- 4. It is LCMS's position that it has pleaded a cause of action against the John Doe Regents for breach of fiduciary duties and is entitled to discover their names. LCMS further claims that the First Amendment rights of Freedom of Religion and Freedom of Association as well as the Religious Freedom Restoration Act do not protect CTX from the discovery. It is also LCMS's position that the validity of its pled cause of action is an issue to be resolved on summary judgment and is irrelevant to the resolution of the discovery dispute.
- 5. CTX's claimed First Amendment privileges and privileges under the Religious Freedom Restoration Act (RFRA). The Parties believe the voting privilege issue is very similar to this issue and the Court's resolution might also address: a) request numbers 1-5, 7-25, 27-33, and 36-58 in LCMS's subpoena to former CTX Regents; b) LCMS's Request for Production to CTX numbers 9, 11, 22, 23, 24, 25, 27, and 40, as well as any other request in which CTX stated it would produce non-privileged information; and c) LCMS's interrogatories to CTX numbers 1-7 and 12-14.
- 6. CTX contends that disclosure of documents and communications among CTX's Officers and Regents (current and former) regarding the contested CTX resolutions, Synod governance of CTX, CTX's relationship with Synod, and CTX's governance violate CTX's and its governing Board and Officers' First Amendment rights to Freedom of Religion and Freedom of Association. CTX has provided briefing to this Court for the basis of these privileges. Given the volume of

requests and potentially responsive material, and CTX's production of documents responsive to

LCMS's requests, any delay in production has not been in bad faith. CTX seeks only the ability to

adequately review responsive material and to preserve its privileges.

It is LCMS's position that CTX has no right to claim a 1st Amendment privilege against 7.

LCMS and briefed that position to the Court. It is also LCMS's position that CTX has waived its

First Amendment privileges by not asserting them in its first written response to LCMS's discovery

requests.

8.

Zachman, Hill and Taylor subpoenas and subpoena duces tecum. The Parties agree to

the resolution of this issue and request an Order from the Court that the former Regents Tom

Zachman, Nathaniel Hill and Alan Taylor submit documents responsive to subpoenas issued by

LCMS to counsel for CTX for review and production pursuant to the Agreed Protective Order

which would allow CTX the ability to receive, review, and produce a privilege log of withheld

materials produced by former Regents responsive the subpoena deuces tecum.

Respectfully submitted,

By: /s/ Steven C. Levatino

Steven C. Levatino

State Bar No. 12245250

**Levatino Pace PLLC** 

1101 S. Capital of Texas Hwy.

Bldg. K, Suite 125

Austin, Texas 78746

T: 512-637-1581

F: 512-637-1583

steven@lpfirm.com

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Andrew F. MacRae State Bar No. 00784510 MacRae Law Firm PLLC 3267 Bee Cave Road Suite 107, PMB 276 Austin, Texas 78746 T: 512-565-7798 andrew@macraelaw.com

Gregg R. Kronenberger State Bar No. 24039998 Kronenberger Law Firm, PLLC 1101 S. Capital of Texas Hwy. Bldg. K, Suite 125 Austin, Texas 78746 T: 512-777-4141 F: 512-402-3313 M: 512-923-3158 gregg@gkronenberger.com

Attorneys For Plaintiff
The Lutheran Church – Missouri Synod

## /s/ Daniel R. Richards

Daniel R. Richards
State Bar No. 00791520
drichards@rrsfirm.com
Clark Richards
State Bar No. 90001613
crichards@rrsfirm.com
Albert A. Carrion, Jr.
State Bar No. 03883100
acarrion@rrsfirm.com

RICHARDS RODRIGUEZ & SKEITH, LLP 611 West 15<sup>th</sup> Street Austin, Texas 78701 Telephone: (512) 476-0005

Attorneys For Defendants Concordia University Texas, Inc., Donald Christian And Christopher Bannwolf

## **CERTIFICATE OF SERVICE**

I hereby certify that on the 12<sup>th</sup> day of November 2024, I electronically filed the above and foregoing document, which will send notification of such filing to:

Steven C. Levatino Levatino & Pace PLLC 1101 S. Capital of Texas Hwy. Bldg. K, Suite 125 Austin, Texas 78746 steven@lpfirm.com

Gregg R. Kronenberger Kronenberger Law Firm, PLLC 1101 S. Capital of Texas Hwy. Bldg. K, Suite 125 Austin, Texas 78746 gregg@gkronenberger.com Andrew F. MacRae MacRae Law Firm PLLC 3267 Bee Cave Road Suite 107, PMB 276 Austin, Texas 78746 andrew@macraelaw.co

/s/ Daniel R. Richards

DANIEL R. RICHARDS